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Supreme Court of the United States

October Term, 1968

No. 1041

SAMUEL A. KAUFER,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FREDERICK H. BLOCK
295 Madison Avenue
New York, N. Y.

HERBERT MONTE LEVY
61 Broadway
New York, N. Y.

Attorneys for Petitioner

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented for Review ...	2
Constitutional Provision Involved.	3
Statement of the Case	3
POINT I - Certiorari Should Be Granted in View of the Clear Conflict Between the Second and Seventh Circuits As to Whether Warrantless Electronic Eavesdropping Is Violative of a Defendant's Fourth Amendment Rights	5
POINT II - Certiorari Should Be Granted in View of the Clear Conflict Between the Second and Tenth Circuits as to Whether Warrantless Eavesdropping on An Extension Telephone Is Violative of a Defendant's Fourth Amendment Rights	7
POINT III - If This Court Agrees With the Seventh and Tenth Circuits, Petitioner Should Receive the Benefit of Its Holding That His Rights Were Violated. There Is No True Problem of Retrospective Application Here	8
Conclusion	10

CASES CITED

	PAGE
Doty v. United States, -F2d- (10 Cir. 6/4/68)	7
Fay v. Noia, 372 U.S. 391 (1963)..	9
Gideon v. Wainwright, 372 U.S. 335 (1963)	9
Katz v. United States, 389 U.S. 347 (1967)	3,5,6, 8
Lee v. Florida, 392 U.S. 378 (1968)	8
Linkletter v. Walker, 381 U.S. 618, 638 (1964)	9
Lopez v. United States, 373 U.S. 427 (1963)	6,9,10
Mapp v. Ohio, 367 U.S. 643 (1961)	8
Osborn v. United States, 385 U.S. 323 (1966)	6,9,10
Rathburn v. United States, 355 U.S. 107 (1957)	8
United States v. White, -F2d- (7 Cir. 1/9/69)	5,6

OTHER AUTHORITIES

United States Constitution, Amendment IV	3
28 U.S.C. §1254(1)	2
28 U.S.C. §1651	5

IN THE
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No.

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UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Samuel A. Kaufer, hereby petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit entered herein on January 14, 1969, which affirmed the District Court's order denying petitioner's application for post-conviction relief.

Opinions Below

Neither the opinion of the Court of Appeals nor of the District Court have been yet reported; they are appended

hereto as Appendices A and B respectively. The earlier opinion of the Court of Appeals, affirming petitioner's conviction on grounds other than those urged here, is reported at 387 F. 2d 17 (2d Cir. 1967), and is appended hereto as Appendix C.

Jurisdiction

The order sought to be reviewed was made and entered on January 14, 1969. The statutory provision believed to confer on this Court jurisdiction to review the order in question is 28 U.S.C. Sec. 1254(1).

Questions Presented for Review

1. Were petitioner's Fourth Amendment rights violated by electronic eavesdropping by federal agents without prior judicial warrant (although there was ample time to obtain one), on a private conversation between a federal agent and a prospective defendant and by the introduction at the later trial of the tape recording of the broadcast as independent evidence?

2. Were petitioner's Fourth Amendment rights also violated where a federal agent, without prior judicial warrant (although there was ample time to obtain one), telephones a prospective defendant after arranging for another federal agent to eavesdrop secretly on the conversation on an extension phone and where the testimony as to the conversation by the eavesdropping agent is admitted as independent evidence at the later trial?

3. May these questions be raised in an application for post-conviction relief?

Constitutional Provision Involved

Amendment IV, United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * ."

Statement of the Case

Petitioner Kaufer was convicted in the United States District Court for the Southern District of New York after a trial in May, 1967 on charges of bribing an employee of the Internal Revenue Service in violation of 18 U.S.C. §201(b). The conviction was affirmed on appeal (on grounds other than those urged here) to the Second Circuit [*United States* v. *Kaufer*, 387 F.2d 17 (2 Cir. 1967)] on the same day this Court decided *Katz v. United States*, 389 U.S. 347.

Petitioner then commenced cooperation with the government in criminal prosecution of others, but was unsuccessful in a subsequent motion for reduction of his one year and $4,000 fine sentence (Doc. 12).*

Petitioner thereupon moved for a writ of error *coram nobis* to set aside his con-

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*Such references are to the papers as indexed constituting the certified record.

viction, asserting that the government had engaged in unconstitutional electronic eavesdropping and had used the fruits thereof at his trial. The material facts in regard thereto are as follows:

Internal Revenue Agent Arney, having reported to his superior an alleged bribe offer by petitioner made the day before (Doc. 7, pp. 10,12,15),* telephoned petitioner at petitioner's office, and was referred to another number where he could reach petitioner. Arney called petitioner there, without disclosing the fact that IRS Agent Goldenberg was "monitoring" the conversation on another phone (Doc. 7, p. 16). Arney's testimony as to the contents of this conversation (Doc. 7, p. 19), was not incriminating, but Goldenberg's testimony as to the contents of that phone conversation (Doc. 7, p. 110), was incriminating.

Subsequently, some days after Arney had arranged an appointment with petitioner, Arney went to the meeting equipped with a radio transmitter while other agents who maintained surveillance were equipped with receiving equipment (Doc. 7, pp. 113,142-143). After Arney had testified as to his version of the conversation at the meeting (Doc. 7, pp. 22-26), the tape made as a result of the radio transmission was received in evidence (Doc. 7, pp. 152-153).

Goldenberg's testimony and the tape recording as independent evidence played

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* Such references are to pages in the trial transcript, Documents 7 and 8 in the certified record.

a decisive role in the jury's deliberations (Doc. 8, May 4, 1967 session, pp. 28,33,38,41,46).

The basis for federal jurisdiction in the first instance on the motion for a writ of error *coram nobis* was 28 U.S.C. section 1651. The motion was denied (App. B).* On appeal, the Second Circuit affirmed the denial (App. A). This petition follows.

POINT I

CERTIORARI SHOULD BE GRANTED IN VIEW OF THE CLEAR CONFLICT BETWEEN THE SECOND AND SEVENTH CIRCUITS AS TO WHETHER WARRANTLESS ELECTRONIC EAVESDROPPING IS VIOLATIVE OF A DEFENDANT'S FOURTH AMENDMENT RIGHTS.

On January 7, 1969, the United States Court of Appeals for the Seventh Circuit, sitting *en banc* on rehearing, in *United States* v. *White*, - F2d - (App. D hereto), held inadmissible under the Fourth Amendment the fruits of warrantless electronic eavesdropping by federal agents on conversations between the defendant and an informer.

The Seventh Circuit reached this result through application of the criteria recently set forth by this Court in *Katz* v. *United States*, 389 U.S. 347 (1967).

In the case at bar, just seven days after *White*, the Second Circuit ruled exactly to the contrary. The Second Circuit itself noted the conflict, writing (App. A-4):

*Such references are to the Appendices hereto.

"* * * We are not persuaded by the contrary majority opinion of the Court of Appeals for the Seventh Circuit sitting *en banc* in *United States* v. *White*, decided January 7, 1969 by a divided court, with Chief Judge Castle and Circuit Judges Hastings and Fairchild dissenting."

The decision of the Seventh Circuit in *White* and the decision here of the Second Circuit cannot be reconciled, and are clearly and directly in conflict. The fact that in *White* the sound-wired informer did not testify whereas Arney did in the case at bar is a distinction without a difference. The crucial fact is that in both cases there was no "antecedent justification" before a magistrate for "the kind of electronic surveillance involved in this case." *Katz* v. *United States*, *supra*, p. 359; cf. *Osborn* v. *United States*, 385 U.S. 323 (1966).

The Seventh Circuit in *White* distinguished *Lopez* v. *United States*, 373 U.S. 427 (1963), on the ground that *Lopez* held recordings of conversations admissible for the limited purpose of corroboration (App. D-19,20). Here the recording was introduced as independent evidence. Moreover, *Lopez* -- which did not involve electronic eavesdropping -- was impliedly overruled by *Katz* which made it clear that eavesdropping activities conducted without judicial sanction "are per se unreasonable under the Fourth Amendment". 389 U.S. at 357.

The importance of the issue decided by the Seventh and Second Circuits, in a day and age when surreptitious electronic

eavesdropping is both widespread and easily performed through ingenious and easily concealed devices, needs no argument. The issue raised in the case below needs settling at the earliest possible moment so as to properly guide federal law enforcement officers and to avoid the troublesome situations which would exist should the conflict of Circuits not be settled promptly.

District Judge Murphy, writing here below of the initial decision in *White* (later to be upheld by the full Court on rehearing), noted (App. B-1):

> "* * * Whatever may be the ultimate ruling in *United States* v. *White*, -F2d- (7th Cir. 1968), rehearing *en banc* granted, May 28, 1968, it would have to, I suppose, be further considered by the Supreme Court."

We agree. The conflict is clear and review should be granted.

POINT II

CERTIORARI SHOULD BE GRANTED IN VIEW OF THE CLEAR CONFLICT BETWEEN THE SECOND AND TENTH CIRCUITS AS TO WHETHER WARRANTLESS EAVESDROPPING ON AN EXTENSION TELEPHONE IS VIOLATIVE OF A DEFENDANT'S FOURTH AMENDMENT RIGHTS.

On June 4, 1968, the United States Court of Appeals for the Tenth Circuit in the case of *Doty* v. *United States*, -F2d- (App. E hereto), petition for

rehearing pending, held inadmissible under the Fourth Amendment on the authority of *Katz v. United States*, *supra*, tape recordings of telephone conversations which had been carried on between the defendant and an undercover federal agent. The Tenth Circuit, in ruling that the tape recordings had been improperly received at trial, placed its decision squarely on the ground that "no prior approval by judge or magistrate was sought or obtained" (App. E-12-14).

This decision is squarely in conflict with the ruling in the case at bar. The two cases are indistinguishable in that both involved "the uninvited ear" prohibited under *Katz*, *supra*, 389 U.S. at 352.

Rathbun v. United States, 355 U.S. 107 (1957) and *Lee v. Florida*, 392 U.S. 378 (1968) cannot be said to be controlling here because both cases involved construction of the Federal Communications Act, section 605, but not the Fourth Amendment.

POINT III

IF THIS COURT AGREES WITH THE SEVENTH OR TENTH CIRCUIT, PETITIONER SHOULD RECEIVE THE BENEFIT OF ITS HOLDING THAT HIS RIGHTS WERE VIOLATED. THERE IS NO TRUE PROBLEM OF RETROSPECTIVE APPLICATION HERE.

Unlike this Court's decisions working fundamental changes in principle [*e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961)], a decision of this Court agreeing with our contentions and the decisions of the Seventh and Tenth Circuits would work no

such change. There is no doubt that the Fourth Amendment has always been applicable to federal courts. Since "the principle * * * predated the arrest as well as the original convictions * * *," there is "no question of retrospective operation involved" in each of these cases. *Linkletter v. Walker*, 381 U.S. 618, 638 (1964).

Indeed, since this is a federal case, it presents an *a fortiori* situation when compared to the granting of post-conviction relief to state prisoners in such cases as *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Fay v. Noia*, 372 U.S. 391 (1962).

If, however, the Court should feel that there is a basis for distinction, the retrospective application of its decision could be limited as hereinafter suggested.

Even if prosecutors might have relied upon *Lopez* v. *United States*, *supra*, in introducing evidence obtained through electronic eavesdropping,[1] such reliance would have been misplaced after the decision of this Court in *Osborn v. United States*, 385 U.S. 323 (1966). In *Osborn*, the prosecutor had obtained judicial warrants before engaging in electronic eavesdropping. And this Court, in upholding the admissibility of evidence so obtained, was careful to rely *not* upon its majority decision in *Lopez*, but upon the *dissentina*

[1]Reliance upon *Lopez* would have been misplaced, for it did not involve the "uninvited ear" via electronic eavesdropping.

opinion in *Lopez*. This Court thus gave fair and clear warning that the dissents in *Lopez*, rather than the majority, were to be the law. Reasonable reliance upon *Lopez* could not have continued after *Osborn*.

This Court's opinion in *Osborn*, *supra*, came down in December 1966; the trial here did not begin until May 1967. Thus, we suggest that if there is a problem of retrospective application, any decision need be retroactive only to December 12, 1966, the date of this Court's decision in *Osborn*.

CONCLUSION

This Court should grant certiorari and the order below should be reversed.

February, 1969.

Respectfully submitted,

FREDERICK H. BLOCK &
HERBERT MONTE LEVY
Attorneys for Petitioner

APPENDICES

INDEX TO APPENDICES

		PAGE
Appendix A -	Opinion below of the Court of Appeals for the Second Circuit	A-1
Appendix B -	Opinion below of the United States District Court for the Southern District of New York ..	B-1
Appendix C -	Opinion on first appeal in *United States v. Kaufer*, 387 F2d 17 (2 Cir. 1967)	C-1
Appendix D -	Opinion in *United States v. White*, -F2d-, (7 Cir. 1/9/69)	D-1
Appendix E -	Opinion in *Doty v. United States*, -F2d-, (10 Cir. 6/4/68)	E-1

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 212--September Term, 1968

Argued December 4, 1968
Decided January 14, 1969

Docket No. 32692

UNITED STATES OF AMERICA,
Appellee,

v.

SAMUEL A. KAUFER,
Appellant.

B e f o r e :

Lumbard, *Chief Judge*
Friendly, *Circuit Judge*
and
Frankel, *District Judge**

Appeal from an order of the United States District Court for the Southern District of New York, Thomas F. Murphy, J., denying a motion for writ of error *coram nobis*.

Affirmed.

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* *Sitting by designation.*

Ross Sander, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York and Charles P. Sifton, Assistant United States Attorney, on the brief), *for appellee.*

Frederick H. Block, New York, N. Y., *for appellant.*

PER CURIAM:

This appeal turns on whether *Katz* v. *United States*, 389 U. S. 347 (1967), which held that the use of evidence obtained by attaching an electronic listening device to the outside of a public telephone booth was unconstitutional, and which was decided, coincidentally, on the same day we affirmed Kaufer's conviction, requires a reversal of Kaufer's conviction. We hold that it does not and we affirm the order of the district court.

Samuel A. Kaufer appeals from the denial of his motion for a writ of error *coram nobis* to set aside his conviction of bribing an Internal Revenue Service employee in violation of 18 U. S. C. §201(b). The facts are set out in our opinion affirming the appellant's conviction. *United States* v. *Kaufer*, 387 F. 2d 17 (2d Cir. 1967). The trial established that in 1966 the appellant, who was then a Certified Public Accountant, had a series of meetings with IRS Agent Charles Arney, Jr. to discuss an audit of one of his client's federal income tax returns. At one of these meetings, after being informed that an additional tax of $7,000 or $8,000 was due, appellant offered Arney $400 in cash

to recommend a lower figure. Arney told the appellant that he would consider the offer. After the meeting Arney immediately told his superiors of the bribe offer, and the next day, with IRS Agent Goldenberg listening on an extension phone, Arney called appellant and told him that he would accept the offer. They agreed to meet a few days later at a subway station to complete the transaction. At this meeting, Arney carried a radio transmitter and had a recording device in his attache case. Two tapes of the conversation between Arney and Kaufer were made, one of which was admitted into evidence after the trial court determined that it was the better recording. Both Agent Arney and Agent Goldenberg testified at the trial.

Kaufer claims that the evidence of his conversations with Agent Arney, obtained by electronic devices and by the use of an extension telephone, were improperly received at the trial. He relies primarily upon the Supreme Court's decision in *Katz* v. *United States*, 389 U. S. 347 (1967), which held that attaching an electronic device to the outside of a public telephone booth constituted a violation of Fourth Amendment rights and evidence so obtained could not be used at trial.

Katz v. *United States* has no application to this case. *Katz* involved electronic surveillance performed without the knowledge of any of the participants in the intercepted conversation. The procedure used against Kaufer involved the recording of a conversation with the consent of one of the parties to that conversation, a procedure upheld in *Lopez* v. *United States*, 373 U. S. 427 (1963). A recording here, as distinguished from that

in *Katz*, merely serves to preserve the consenting participant's recollection. Compare *Lopez*, 373 U. S. at 439: "We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording." The risk that an unknown third party will intercept and record the conversation, as was done in *Katz*, is obviously of a far different order. The cases are thus clearly distinguishable, and it cannot be said, as appellant urges, that *Lopez* has been overruled, *sub silentio*, by *Katz*. See *United States* v. *Jackson*, 390 F. 2d 317 (2d Cir.), cert. den., 392 U. S. 935 (1968); *Dancy* v. *United States*, 390 F. 2d 370 (5 Cir. 1968); *Holt* v. *United States*, - F. 2d - (10 Cir. Sept. 16, 1968). See also *Katz* v. *United States*, 389 U. S. at 363 (White, J., concurring). We are not persuaded by the contrary majority opinion of the Court of Appeals for the Seventh Circuit sitting *en banc* in *United States* v. *White*, decided January 7, 1969 by a divided court, with Chief Judge Castle and Circuit Judges Hastings and Fairchild dissenting.

Likewise, Kaufer's claim that his Fourth Amendment rights were violated when Agent Goldenberg listened on an extension telephone to his conversation with Agent Arney is without merit. *Rathbun v. United States*, 355 U. S. 107 (1957); *United States v. Jackson*, *supra*, 390 F. 2d at 318-319; *Hempell v. United States*, 392 F. 2d 45, 48 (8 Cir. 1968). The logic of the *Rathbun* case, that "each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear

the conversation," 355 U. S. at 111, is in no way undermined by the decision in *Katz*, where a conversation was overheard with the use of electronic attachments and without the consent of either of the parties. See the discussion of *Rathbun* in *Lee v. Florida*, 392 U. S. 378, 381 (1968). See also *Dryden* v. *United States*, 391 F. 2d 214 (5 Cir. 1968).

Since we hold that *Katz* v. *United States* has no application to the facts of this case there is no need to consider the contention of the government that its holding should not be applied retroactively.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- x

In the Matter of the Application of

SAMUEL A. KAUFER,

For a Writ of Error Coram Nobis in the case of United States of America against Samuel A. Kaufer, defendant- 66 Cr. 638.

- x

66 Cr. 638

#35058

MEMORANDUM

MURPHY, D. J.

Assuming that the extraordinary relief of *coram nobis* is the proper remedy, see United States v. Morgan, 346 U.S. 502,511 (1954), we deny the application.

We are not persuaded that Katz v. United States, 389 U.S. 347 (1967) is apposite, or that Lopez v. United States, 373 U.S. 427 (1963) has been overruled *sub silencio* by *Katz*. Whatever may be the ultimate ruling in United States v. White, - F.2d - (7th Cir. 1968), rehearing *en banc* granted, May 28, 1968, it would have to, I suppose, be further considered by the Supreme Court. As a puisne judge, we hardly can overrule *Lopez* pending this event. This is equally true as to overruling United

States v. Rathburn, 355 U.S. 107 (1957).

This is an order. No settlement is necessary.

s/ Thos F. Murphy
U.S.D.J.

Dated, New York, N. Y., July 30, 1968.

APPENDIX C

UNITED STATES of America,
Appellee,
v.
Samuel A. KAUFER, Appellant.
No. 165, Docket 31576.

United States Court of Appeals
Second Circuit.

Argued Nov. 27, 1967.
Decided Dec. 18, 1967.

Boris Kostelanetz, New York City (Kostelanetz & Ritholz, New York City; Edward J. Daus, New York City, of counsel), for appellant.

John S. Allee, Asst. U. S. Atty., New York City (Robert M. Morgenthau, U. S. Atty., for the Southern District of New York, New York City, and Pierre N. Leval, Asst. U. S. Atty., New York City, of counsel), for appellee.

Before MOORE, SMITH and HAYS, Circuit Judges.

MOORE, Circuit Judge.

Appellant, Samuel A. Kaufer, was convicted of bribing an employee of the Internal Revenue Service (the IRS) in violation of 18 U.S.C. § 201(b). In early 1966, appellant, who was then a Certified Public Accountant, met with Internal Revenue Agent Charles J. Arney, Jr., at appellant's office in New York City to discuss an audit of the 1964 joint income tax return of two of appellant's clients.

Agent Arney noted that there was no substantiation for over $16,000 claimed as expenses on that return and appellant agreed to try to locate the missing substantiation. However, no substantiation was furnished and no effort was made to obtain duplicate bills for the expense items involved, and on Friday, July 21, 1966, Arney informed appellant that he would have to propose an additional tax of between $7,000 and $8,000.

Agent Arney testified that at the July 21st meeting, appellant told him that his clients would probably not agree to a deficiency of more than $500. Appellant offered Arney $400 in cash if he would reduce Form 870 (Waiver of Restrictions of Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment) to around $500. Arney told appellant that he would have to consider whether or not to write up the report on that basis and agreed to call appellant if he decided to go along with the proposal.

According to appellant's version of the story, Agent Arney misinterpreted his remarks. He claimed that the $400 was not offered as a bribe, but merely as an offer partially to pay a tax deficiency. Appellant testified that he and Arney were agreed that, except for the unsubstantiated expenses, there was a tax deficiency of $400. Since appellant was anxious to close the case and get away on a vacation, he asked Arney to finish the audit without the missing checks and by writing up Form 870 in an amount not to exceed $500 in tax liability. Appellant explained that the partial payment was to be made in cash because he was

not certain that he could get a check, which required two signatures, over the weekend. He had the $400 in cash on his person which he intended to use as vacation money.

Agent Arney immediately reported the "bribe" offer to his superiors. The next day, with an IRS Inspector listening on an extension phone, Arney called appellant and told him that he had decided to go along with the offer. They agreed to meet at 6:30 p. m. on July 25th in the Bronx at the IRT entrance of the Woodlawn-Jerome subway at 161st Street.

On July 25th, with the aid of IRS inspector George Carros, Agent Arney was equipped with a Fargo radio transmitter which was secreted on his person, and a Minifon recording device which he carried in an attache case. He then met with appellant at the prearranged meeting place. Arney informed appellant that he had reduced the tax deficiency from $7,000 to $497.63. While Arney waited on the street, appellant went into the men's room of a nearby restaurant and counted out the $400. When he returned, he palmed the money and passed it hand-to-hand to Agent Arney. Appellant claims that at that time he asked Arney for a receipt and that Arney stated that he did not have his "receipt book" with him. However, Arney testified that there was no mention of a "receipt," and that he does not have a receipt book.

Appellant was indicted on two counts. Count One charged appellant with giving an employee of the IRS the sum of $400 with intent to influence that employee's official acts in a field audit examination in violation of Title 18 U.S.C. § 201(b).

Count Two charged as to the same $400 payment, the lesser included offense of giving a gratuity for, and because of, an official act, in violation of Title 18 U.S.C. § 201(f). The trial court dismissed Count Two on its own motion. The jury found appellant guilty on Count One.

Two recordings were made of the July 25th conversation. A tape recording was made on a Butoba portable tape recorder from a Fargo radio receiver which received the transmission from the Fargo radio transmitter (GX 7). In addition, there was a Minifon recording wire which was made from the Minifon recording device in the attache case (GX 8). Both recordings were offered into evidence by the government and appellant objected to their admission. The government's technical expert, Agent Carros, testified that GX 7 was the better recording and, after listening to that recording, the trial judge admitted it into evidence.

Appellant argues that it was error for the trial judge to "suppress" GX 8 and not compel its production for appellant's inspection. At the outset, we note that it was appellant who sought to "suppress" both recordings and was successful in his efforts as to GX 8. The record does not disclose that appellant objected to the judge's ruling that he would admit only one of the recordings or to the judge's method for choosing which recording was to be offered. The record also does not support appellant's claim that he was denied his right of cross-examination of Agent Arney with respect to the contents of that recording. Appellant was given every opportunity to listen

to both recordings. Defense counsel below did not take advantage of the government's offer to let him "sit [there] all afternoon and listen to his heart's content." (Record at page 149.) Agent Arney took the stand the day after GX 7 was admitted into evidence, and although appellant's counsel below had then had an opportunity to listen to both recordings, he failed to use them in his cross-examination of Arney. Furthermore, after listening to both recordings many times, appellant's counsel here does not now suggest that GX 8 is any more accurate or intelligible than GX 7 which was admitted. After listening to both recordings ourselves, we are convinced that there was nothing exculpatory contained on either recording or that appellant was in any way prejudiced by the admission of GX 7 rather than GX 8.

Appellant also argues that the court below erred in receiving GX 7 into evidence because it was not properly authenticated and because it was inaudible. The same argument was advanced in Todisco v. United States, 298 F.2d 208 (9th Cir. 1961), cert. denied, 368 U.S. 989, 82 S.Ct. 602, 7 L.Ed.2d 527 (1962). On facts almost identical to the present case, the court noted that all that was necessary was that "the trial judge listen[ed] to the recordings out of the presence of the jury and [that the agent] identify the voices which were heard on the tapes." 298 F.2d at 211. Here both requirements were met. The trial judge listened to GX 7 and found portions of the recording sufficiently audible. We have recently held that this question of degree of audibility is a matter of the trial judge's sound discretion. United States v. Knohl,

379 F.2d 427 (2d Cir.), cert. denied, 389 U.S. 973, 88 S.Ct. 472, 19 L.Ed.2d 465 (1967). Agent Arney testified that he could identify the voices on the recordings as his and appellant's. (Record at pages 31-32.) Furthermore, during the trial defense counsel below, in correcting a statement made by the trial judge, pointed out that appellant did not deny that the recording was of the conversation on July 25th between Agent Arney and the defendant, but only claimed that the recording was so garbled that it could not be understandable. (Record at page 153.)

Finally appellant argues that the court below committed error in not accepting certain timely requests to charge. However, it appears that appellant did not submit an actual request to charge. At the close of the trial, appellant did try to submit a portion of his prepared summary which dealt with reasonable doubt and which, the trial judge indicated, would have been out of order in a summation. It was this that the trial judge refused to accept. (Record at pages 279-84.) At that time the judge said that he would charge reasonable doubt and appellant does not now contend that the charge as given was inadequate.

The resolution of the credibility of the two conflicting versions of the transaction was exclusively within the jury's province. Their determination can scarcely be said to be based on inadequate evidence. Credulity is indeed strained to believe that partial payment of income taxes due would be made in cash by the accountant for a taxpayer to an agent on a noisy street corner in the

Bronx far from the business offices of taxpayer, accountant or the Internal Revenue Service.

The judgment is affirmed.

APPENDIX D

In the
United States Court of Appeals
for the Seventh Circuit

September Term, 1968
September Session, 1968

Nos. 16021-16022
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES A. WHITE,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. On rehearing en banc.

January 7, 1969

Before CASTLE, *Chief Judge*, MAJOR, *Senior Circuit Judge*, SCHNACKENBERG,[1] HASTINGS, KILEY, SWYGERT, FAIRCHILD, CUMMINGS, and KERNER, *Circuit Judges*.

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[1]Although Judge Schnackenberg participated in the en banc rehearing, he died prior to the adoption of this opinion. As author of the prior panel decision of this court, he was of the view that the rationale of *Katz* v. *United States*, 389 U.S. 347 (1967) required reversal of White's conviction.

SWYGERT, *Circuit Judge*. The defendant, James A. White, was tried before a jury and convicted on seven counts of two consolidated indictments which charged him with certain narcotics violations arising under the provisions of 26 U.S.C. §4705(a) and 21 U.S.C. §174. The district court imposed a prison sentence of twenty-five years and fined the defendant $35,000.

A three-judge panel of this court, one judge dissenting, reversed the judgment of conviction. Subsequently, the Government's petition for a rehearing en banc was granted. Upon consideration of this cause by the entire court, we are of the opinion that our prior decision should be followed and that the district court's judgment of conviction must be reversed and the case remanded for a new trial.

The principal error relied upon by the defendant and the one which controls our disposition of this appeal was the admission into evidence of certain incriminating statements made by the defendant which were overheard by means of electronic eavesdropping by Government agents. This eavesdropping was accomplished by the placing of a radio kel set transmitter[2] on the person of a Government informer, Harvey Jackson, before he talked with White at various locations, including the defendant's home, automobile, and place of business, as well as the informer's home. At no time did the agents of the Federal Bureau of Narcotics secure a search warrant or court order authorizing such eavesdropping.

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[2]A radio kel set is a small transistorized device which transmits voices or sound which can be picked up on receiving units.

The Government's evidence tended to prove the following facts. On December 9, 1965, Harvey Jackson, the informer, who did not testify at trial, met defendant White in the kitchen of the informer's Chicago home. The informer had concealed on his person a kel set transmitter and had allowed a narcotics agent, Carl Jackson, to hide himself in a closet adjacent to the kitchen. While agent Jackson was so concealed, he overheard a conversation between informer Jackson and White and observed White transfer a package to the informer. This package, according to subsequent tests, contained heroin. From inside the closet where he could see White and the informer through the slightly open doors, agent Jackson overheard the informer inquire how many ounces there were in the package; the defendant responded, "one good ounce." After asserting that he would return the following day for payment, the defendant left the informer's home. Narcotics agent Robert DeFauw who was situated in an automobile outside the informer's home overheard the entire conversation on a radio which received transmissions from the informer's kel set.

On December 10, 1965 the informer called White from a public telephone and arranged an appointment for that day at the informer's home so that payment for a prior narcotics transfer could be made. Agent Jackson, with the informer's permission, overheard this conversation on the same telephone receiver used by the informer. Agent Jackson and the informer then went to the latter's home, where agent Jackson again concealed himself in the closet and observed the informer and White count $1,000 in official funds, previously given the informer by agent

DeFauw. White put the money in his pocket, told the informer that he would get more "stuff" on December 14, and requested the informer to meet him at 6 p.m. the next day on a specified Chicago street corner for further payment. Again agent DeFauw overheard the entire conversation in his car outside the informer's home by receiving radio transmissions from the kel set which had been previously concealed on the informer's person.

On December 14, 1965 agent DeFauw placed a kel set on the informer's body, furnished him with $360, and followed him to the defendant's residence. A conversation between the defendant and the informer which took place inside the defendant's home was overheard on a radio receiver by agent DeFauw at his position outside White's home. During the course of this monitored conversation, money was counted and arrangements were made for the defendant to sell an additional two ounces of "stuff" on December 16 for $1,250, with payment due within a week and a half after delivery. The defendant requested faster payment since his suppliers wanted their money sooner and arrangements were made to meet again at 6 p.m. on December 16.

On December 16, 1965 agent DeFauw placed a kel set under the informer's clothing and followed him to a Chicago intersection where the informer met White who entered the informer's car. While White and the informer drove around the city for two hours, agent DeFauw, following them in his car, overheard by radio receiver their conversation concerning the price and quality of heroin. Thereafter the informer left the car because

White said he had to meet "this man." White drove the car a few blocks to another Chicago intersection where he picked up Sam Minerva, a supplier of narcotics. At this point agent William Kerstann who was trailing White, observed Minerva emerge from the car after riding a short distance. Kerstann followed White a couple of blocks to a street corner where the informer re-entered the car. By radio receiver, Kerstann overheard the defendant say that he had met a certain man and received a package which he would leave on the seat of the informer's car. Then White said he had to leave the informer in order to meet another man. After White's departure, agent Kerstann entered the car and seized the package containing heroin.

On December 28, 1965 the informer was given $1,250 and a kel set was placed under his clothes. While followed by agent DeFauw, agent Jackson and the informer drove to the latter's residence, where agent Jackson resumed his usual surveillance position in the kitchen closet. Jackson saw the defendant enter the kitchen, sit down at a table, and join the informer in counting the $1,250. When the informer requested more heroin, White advised him that more would be forthcoming the following day, but that payment would have to be made more quickly because the supplier "wanted his money." Agent Jackson overheard the conversation from the closet and agent DeFauw listened on a radio receiver from his position in a car outside the informer's residence.

On the following day, agents David Connolly and Arthur Lewis followed White from his residence to a tavern where he talked briefly to Harry D. Williams, another narcotics peddler, and then departed. After stopping at a clothing store, White

drove to a Chicago intersection where he picked up Minerva who accompanied White for one-half block. Although Minerva was carrying a white shoe box when he entered White's car, he left with a black briefcase. White drove a block, picked up Williams, and returned to the tavern where they had talked earlier the same day. Meanwhile the informer equipped with a kel set, had entered the same tavern. While Williams remained in the car, White went into the tavern and talked with the informer. They left and drove a few blocks in separate cars to a point where the defendant stopped, got out of his car, walked to the informer's car, and handed him a sack. Agent Vernon Meyer, who had been surveilling the informer's activities, heard over a radio in his car the defendant ask the informer to take Williams to the city's south side. Williams, also carrying a brown paper sack, entered the informer's car and drove with him to their appointed destination. After discharging Williams, the informer met agent DeFauw and gave him the paper sack which contained heroin.

On January 5, 1966 agent DeFauw placed a kel set on the informer and gave him $1,300. From the closet in the informer's kitchen where he was secreted, agent Jackson observed the defendant and the informer count the money. The defendant told the informer to bring the "remaining $950" to the Dining Room Aluminer, a restaurant operated by White. White also requested that the informer purchase a large amount of heroin and pay in advance. The entire conversation was heard by agent DeFauw over the radio in his car.

Two days later, the informer was given $950 and had a kel set placed on

his person by agent DeFauw. The agent followed the informer to White's Dining Room Aluminer which the informant entered. From his automobile, agent DeFauw heard over his radio the defendant tell the informer that the price of heroin was going up and that he should meet White at a Chicago intersection where a $2,500 heroin delivery would be made.

On January 8, 1966 agent DeFauw saw Minerva standing at a city bus stop. The defendant drove up, stopped, opened the door, and Minerva approached the car. White said, "Come on, man, give me the package, I've got to get out of here." Minerva handed a brown leather briefcase into the car and said that he would pick up the money later. Agent DeFauw placed the defendant White under arrest and seized the briefcase containing heroin.

The Government's evidence was based largely upon oral testimony by the narcotics agents that they overheard incriminating statements made by White to the secret informer, Harvey Jackson, and transmitted by the kel set device. As we have heretofore stated, these transmitted conversations occurred in the defendant's home, automobile, and place of business as well as in the informer's automobile and home.[3] The defense

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[3]There can be no doubt that these may be constitutionally protected areas. "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." *United States v. Katz*, 389 U.S. at 359. See also, *United States v. Hagarty*, 388 F.2d 713 (7th Cir. 1968); *Lanza v. New York*, 370 U.S. 139 (1962) (jail visiting room not a protected area). It is not the area alone, but the relationship between the area and the person and the person protected that is critical.

objected when agent DeFauw and other agents testified concerning White's incriminating statements transmitted from the kel set concealed on the informer's body. The objection was overruled. A motion by the defense made at the conclusion of the Government's case to strike the conversations to which the various agents testified on the ground that they were in violation of the fourth and fifth amendments was denied by the court.

The central issue presented is whether defendant White's fourth amendment rights, protecting him against governmental intrusion by unreasonable search and seizure, were infringed when the Government narcotics agents electronically intercepted his private conversations.

To decide the constitutionality of the Government's surreptitious overhearing of White's conversations, we apply the criteria recently set forth in *Katz* v. *United States*, 389 U.S. 347 (1967). The facts of *Katz* were that Federal Bureau of Investigation agents, having probable cause and acting in a carefully controlled manner but without prior judicial approval, placed an electronic listening and recording device outside a public telephone booth and intercepted telephone conversations which the defendant made from the booth to others without the knowledge or consent of the defendant or any of the other parties to the conversations. In reversing the defendant's conviction, the Supreme Court held that the admission of these conversations as evidence, covertly obtained by electronic surveillance, was improper because they were seized in violation of the defendant's fourth amendment rights. Essentially, the Supreme Court's determination was grounded on the lack of prior

judicial authorization, because no search warrant had been obtained, and the fact that under the circumstances antecedent justification before a magistrate was essential to insure the defendant's fourth amendment guarantees.

The *Katz* opinion stated that the fourth amendment is designed to preserve privacy against the "uninvited ear" of governmental intrusion and must be applied to "protect people, not places."[4] The trespass doctrine, suggested earlier in *Olmstead* v. *United States*, 277 U.S. 438 (1928), and *Goldman* v. *United States*, 316 U.S. 129 (1942), and which provided the basis for prior Supreme Court decisions in this area, such as *On Lee* v. *United States*, 343 U.S. 747 (1952), was squarely discarded by the Court in *Katz*: "[T]he underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." 389 U.S. at 353.

The *Katz* case further indicates that conversations are within the scope of the

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[4]The relationship between eavesdropping and the right to privacy has been the source of continuing judicial concern. Wiretapping and other forms of eavesdropping are recognized by even their most zealous advocates as encroachments on a man's right to privacy, characterized by Justice Brandeis as "the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion).

fourth amendment's protection: '[T]he Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass . . . under local property law.' *Silverman* v. *United States*, 365 U.S. 505, 511." 389 U.S. at 353. Consequently, White's covertly overheard statements are within the scope of the fourth amendment's guarantees.

The Government urges us to disregard the *Katz* rationale because of certain factual differences. Although we recognize these factual differences, we believe them to be without legal significance. It is true that the *Katz* case involved governmental interception of a conversation without the consent or knowledge of either party, whereas in the present case one party to the monitored conversation, informer Jackson, was cognizant of the Government's eavesdropping activities.

It is our opinion, however, that the surreptitious placing of the kel set on informer Jackson was for all conceptual purposes the same as the surreptitious wiring of the telephone booth in *Katz*. Each act was part of a "bugging" technique by which a conversation was transmitted to an "uninvited ear"--government agents. The crucial fact in each case is that the respective speakers did not consent to the overhearing of their statements and that the conversations were overheard by third persons uninvited by the speaker.

To claim, as the Government does, that one party can waive the fourth amendment rights of another is the same thing as saying that *Katz* would have been decided differently if the receipient of the

intercepted phone call had consented to the Government's bugging. We are unable to believe that such a meaningless form of consent would have rendered the defendant's overheard statements any more admissible in *Katz*. Since we think no distinction of constitutional significance can be drawn between the third party overhearing presented in *Katz* and the consensual monitoring here, the fact of listener consent is without decisional significance and cannot operate as a waiver of any speaker's fourth amendment rights.[5]

The content of the defendant's private conversations, intercepted by the Government's clandestine activity and without prior judicial control, must be held as per se inadmissible evidence if the language of *Katz* is literally applied:

> Searches conducted without warrants have been held unlawful notwithstanding facts questionably showing probable cause," *Agnello*

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[5]In holding that the rationale of *Katz* applies regardless of whether one party to a private conversation consents to the Government's interception of the conversation, we do not purport to make any determination regarding the voluntariness of informer Jackons's participation in the agents' scheme. Since it is our view that a listener's consent is irrelevant, it is difficult to see how informer Jackson's conduct, whether the product of coercion or consent, could have constituted a waiver of the defendant's constitutional rights. Only his own consent could have created such a waiver. The rationale of *Katz* permits no other conclusion.

v. *United States*, 269 U.S. 20, 33, for the Constitution required "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . ." *Wong Sun* v. *United States*, 371 U.S. 471, 481-82. "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States* v. *Jeffers*, 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions.[6] *Katz* v. *United States*, 389 U.S. at 357 [footnotes omitted].

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[6]These exceptions permit a warrantless search whenever the burden of obtaining a warrant would be likely to frustrate the purpose of the search. *See, e.g., Camara v. Municipal Court*, 387 U.S. 523, 533 (1967). Thus, the Court has allowed a warrantless search of an automobile on the ground that it might leave the jurisdiction before a warrant could be obtained, *Carroll v. United States*, 267 U.S. 132 (1925), and has approved taking a blood sample without first securing a warrant as necessary to prevent dissipation of the blood's alcoholic content, *Schmerber v. California*, 384 U.S. 757 (1966). In the present case, the Government did not argue that the evidence would have been lost due to the delay of obtaining a warrant, nor do the facts suggest that such an argument could have been made.

It is especially important that the Court in *Katz* referred with approval to *Osborn* v. *United States*, 385 U.S. 323 (1966), where the essentiality of prior authorization was emphasized. In *Osborn* a paid informer recorded conversations between himself and the defendant in order to corroborate his sworn statement that the defendant was attempting to employ him to bribe a prospective juror. *Osborn* teaches what the agents in the instant case should have done, but failed to do, namely, obtain a warrant authorizing the use of electronic surveillance devices.

The exceptions to the warrant rule of *Osborn* and *Katz* which are explicitly mentioned in the *Katz* opinion do not have application to the governmental eavesdropping endeavors presented by the present case. In fact, our conclusion that the agents' testimony relating to the transmitted statements of the defendant which they overheard is inadmissible is strengthened by the Supreme Court's unequivocal language which clearly precludes the existence of any fourth amendment exception for consensual surveillance. "And, of course, the very nature of electronic surveillance *precludes* its use pursuant to the suspect's consent." *Katz* v. *United States*, 389 U.S. at 358 (emphasis added). Thus the literal language of *Katz* as applied to the case before us would require reversal since White did not consent to the eavesdropping and no antecedent justification was sought.

Our view as to the result which must be reached upon the application of the *Katz* principles is reinforced by our understanding of the fourth amendment. That amendment's search and seizure protection is lost to a person when his actions as a matter of law can be said to constitute a

of his right. Since the fourth amendment protects a speaker's right to privacy, this right would be illusory if it could be waived by other individuals.

The decisions provide a catalogue of instances where a speaker's behavior is such that a waiver of his fourth amendment rights has occurred as a matter of law. For example, *Hoffa* v. *United States*, 385 U.S. 293 (1966) is based on the unarticulated rationale that when one speaks he takes the risk that his intended listener may subsequently testify as to the contents of the conversation. Such a risk, although perhaps the produce of a "misplaced confidence," is reasonably foreseeable, and thus objection thereto is waived. Another risk taken by a speaker is outlined in *Rathbun v. United States*, 355 U.S. 107 (1957).[7] In that case, the Court determined that on a constructive knowledge theory it is not unreasonable to say that one who places a telephone call takes the risk that an extension on the other end of the line may be picked up by an uninvited third party with or without the complicity of the

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[7]To the extent that *Rathbun* is based on the one party consent theory, it is inconsistent with the broad ruling of *Katz*. We view it from the speaker risk point of view for purposes of our present discussion.

intended listener.[8] The focal point in determining the existence of a speaker's fourth amendment rights must be whether his activity was directed at keeping his statements private and what were the risks of overhearing which he should have justifiably anticipated at the time of his statements.[9] In deciding whether the

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[8]It is important for courts deciding fourth amendment questions to take into account the relationship between that amendment and the first amendment's penumbral protection of privacy. It is this nexus which makes a speaker risk analysis appropriate. If the law places great risks of governmental intrusion on an individual's activity, especially his private speech, he will be inhibited in the free exercise of his first amendment rights, that is, the broader the scope of governmental searches and seizures which are determined to be consistent with the fourth amendment, the narrower the ambit of protected first amendment activity will become. This important interrelationship is detailed in GREENAWALT, *The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a conversation*, 68 COLUM. L. REV. 189 (1968).

[9]This court, speaking through Judge Hastings, recently recognized a substantially similar inquiry: "One who intents a conversation or transaction to be private and takes reasonable steps to keep it private is protected from government intrusion unauthorized by warrant or well-defined special circumstances." *United States v. Haden*, 397 F.2d 460, 465 (7th Cir. 1968).

defendant waived his fourth amendment rights, we are mindful of the Supreme Court's admonition in *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938): "[C]ourts [should] indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . we 'do not presume acquiescence in the loss of fundamental rights.'"

Nonetheless, the Government, relying upon the following statement from *Katz*, attemps to distinguish that opinion from the facts before us, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *United States* v. *Katz*, 389 U.S. at 351. To ascertain the applicability of that formulation, we must address ourselves to the questions of whether the Government's activities violated a justifiable expectation of privacy which the defendant held and whether he acted in such a manner as to knowingly expose his statements and thus waive his rights.[10] A realistic appraisal of the defendant's conduct permits no other conclusion than that he justifiably expected

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[10]Other tests have been suggested to determine the precise contours of the fourth amendment's protection. As articulated in his concurring opinion in *Katz*, Justice Harlan sets up a twofold requirement: "[f]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361 (concurring opinion).

his conversations to be private.[11] The well-laid plans of the Government agents were made because they recognized that the defendant sought to exclude their uninvited ears. Why else would they have hired informer Jackson, placed upon his person a hidden radio transmitter, and concealed agent Jackson in the informer's kitchen closet to overhear the defendant's conversation? Additionally, the locations chosen for the private conversations indicate that the defendant took reasonable steps to protect against governmental intrusion. In such a situation we can only conclude that the defendant's fourth

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[11]The justifiable expectation of privacy is a conclusion which must be drawn only after an examination of all the circumstances surrounding the context in which the asserted right arises; one of these circumstances is the place which the individual has attempted to appropriate to his personal use in asserting his claim to privacy. This was illustrated in another search and seizure case decided after *Katz*, *Mancusi v. DeForte*, 392 U.S. 364 (1968). In deciding that a union official has standing to object to seizure of union records from an office he shares with other officials, the Court phrased the relevant question as whether the defendant while occupying such a place could justifiably expect freedom from governmental intrusion.

amendment rights were violated,[12] that the failure to suppress the evidence of his statement was error, and that their admission at trial constituted ground for reversal.[13]

Although the Government has cited numerous cases to support its position,

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[12]According to the language in *Katz*, "[T]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied . . . and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment," *Id.* at 353. The assessment made by the Court regarding *Katz* is equally applicable to the defendant White: "[He] surely is entitled to assume that the words he utters . . . will not be broadcast to the world." *Id.* at 352.

[13]Other courts have reached an identical conclusion in light of the *Katz* decision. *E.g.*, *Doty* v. *United States* F.2d , 3 Crim.L.R. 2220 (10th Cir. 1968), decision on rehearing pending; *United States* v. *Jones*, F.Supp. , 3 Crim. L.R. 3007 (D.D.C. 1968). *Contra*, *Dancy* v. *United States*, 390 F.2d 370 (5th Cir. 1968) (Fahy, J., sitting by designation from the D.C. Cir., dissenting). Other circuits which have faced the issue here presented such as the Second Circuit in *United States* v. *Jackson*, 390 F.2d 317 (2d Cir. 1968), and the Ninth Circuit in *Jack* v. *United States*, 387 F.2d 471 (9th Cir. 1967), voiced their opinion before the Supreme Court's adjudication of *Katz*.

they are inapposite. Unlike the case before us, *Hoffa v. United States*, 385 U.S. 293 (1966), and *Lewis v. United States*, 385 U.S. 206 (1966), presented situations where there was no electronic interception or transmission of the defendants' statements. They stand for the proposition that an informer is a competent witness as to conversations and dealings with a defendant. Looked at from the viewpoint of the speaker, these cases demonstrate that a person confiding in another takes the risk that the confidence may be misplaced and that the confidant may memorize or record the statements and repeat them at trial. That risk and the applicable rule provide no guidance for the present problem.

Likewise, *Rathbun v. United States*, 355 U.S. 107 (1957), a consensual overhearing case not decided on a constitutional basis, involved the assumption of a risk by the defendant that operated as a waiver of his fourth amendment protection. The holdings of *Rathbun* and this court's decision in *Williams v. United States*, 311 F.2d 721 (7th Cir.), *cert. denied*, 374 U.S. 812 (1963), do not settle the question before us and are of no benefit to the Government.

Lopez v. United States, 373 U.S. 427 (1963), has factual features which distinguish it from the instant case. In *Lopez* a concealed device on the person of an undercover agent recorded a conversation between him and the defendant. Admission in evidence of the recording itself to corroborate the undercover agent's testimony was upheld in the circumstances of the case. The important distinction between *Lopez* and this case

is that here the informer, Harvey Jackson, was not produced as a witness whereas in *Lopez* the Government agent was a witness. *Lopez* goes no further than to hold that where an informer testifies as to conversations with a defendant, a recording of such conversations is admissible for the limited purpose of corroboration.

In *Osborn v. United States*, 385 U.S. 323 (1966), a Government informer recorded conversations between himself and the defendant for the purpose of corroborating his allegations that the defendant was endeavoring to employ him to bribe a prospective juror. Although the case involved monitoring with the consent of the informer, there was proper judicial approval of the reasonableness of the recording.

The Government's principal reliance is placed on the decision in *On Lee v. United States*, 343 U.S. 747 (1952). There is an electronic device which transmitted two conversations between an agent and the defendant, one of which took place in the defendant's laundry and the other a few days later on the street, was concealed on the body of an undercover agent. On each occasion the transmitted conversation was heard by a government agent stationed nearby with a receiving device. The agent's testimony as to what he had heard was held admissible over the defendant's contention that the informer was a trespasser and that hence the seizure was proscribed by the fourth amendment. On its facts, *On Lee* is directly in point and would control the disposition of this case if *Katz* had not supervened and if the Supreme Court had not on other occasions completely eroded the decisional basis of *On Lee*.

The recent treatment of the *On Lee* doctrine indicates that it now stands on unfirm ground. Not only did four members of the Supreme Court disagree with *On Lee* when it was decided, but also in *Lopez*, the majority pointed out that *On Lee* was of no help to the defendant. The Chief Justice, in his concurring opinion, was careful to make plain that he could not join in any implication that the majority was accepting the continued vitality of *On Lee*.[14]

The most lethal blow to *On Lee* was dealt by the Court's overruling in *Katz* of the *Goldman* and *Olmstead* bulwark which had provided the conceptual basis for *On*

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[14]Chief Justice Warren said: "Since I agree with Mr. Justice Brennan that *On Lee* was wrongly decided and should not be revitalized, but base my views on grounds different from those stated in the dissent, I have chosen to concur specially."

Justice Brennan, joined by Justices Douglas and Goldberg, stated in dissent: "The Court's refusal to accord more than passing mention in its opinion to the only decision of this Court--*On Lee*--factually analogous to the case at bar suggests very strongly that some of my colleagues who have joined the Court's opinion today agree with us that *On Lee* should be considered a dead letter. For the Court, rather than follow *On Lee*, has adopted the substance of the Government's attempted distinction between *On Lee* and the instant case." *Id.* at 447.

Lee.[15] The overruling of these cases combined with the reasoning of *Katz* leaves no scope for *On Lee's* teaching. For these reasons, *On Lee* cannot be the foundation of our decision.

On the basis of the constitutional principles set forth in *Katz* and our understanding of the protection which the fourth amendment was drawn to provide, we are of the opinion that the surreptitious monitoring of the defendant's conversations was a naked violation of his rights and that the resultant seizure of his statements was not made in confirmity with the provisions of that amendment.[16]

In view of our disposition of this issue we find it unnecessary to consider the other alleged errors presented by the defendant.

Accordingly, we adhere to our previous decision reversing the judgment of the district court and remand the case for a new trial.

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[15]For further discussion, see p. 7, *supra*.

[16]The present decision overrules our prior determinations pertaining to the admissibility of statements seized in situations similar to those presented here. *E.g.*, *United States v. Pullings*, 321 F.2d 287, 295 (7th Cir. 1963), and *United States v. Vittoria*, 284 F.2d 451, 455 (7th Cir. 1960), wherein we held that by consent an individual can waive another party's fourth amendment rights.

CASTLE, *Chief Judge*, with whom Circuit Judges Hastings and Fairchild join, dissenting. I find myself unable to agree that the decisional basis of *On Lee* has been eroded to the extent that the electronic monitoring of the defendant's conversations with the informer, with the latter's consent, must now be regarded as constituting an unreasonable search and seizure in violation of the Fourth Amendment. The majority opinion recognizes that on its facts *On Lee* is directly in point and would control the disposition of this case unless its teaching is to be completely rejected. I join with Justice White in regarding *On Lee* as "undisturbed" by the decision in *Katz*. (Concurring opinion, *Katz v. United States*, 389 U.S. 347, 363, n. (1967)).

Although a substantial part of the rationale of *On Lee* has arguably been discredited in later cases,[1] the case was cited with approval in *Lopez v. United States*, 373 U.S. 427, 438 (1963) and in *Katz v. United States*, 389 U.S. 347, 363 (1967) (Concurring opinion of Justice White).

The Government's use of conversations obtained by the deception of a Government agent has been dealt with in numerous cases, and the validity of such

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[1] *e.g.*, *Warden v. Hayden*, 387 U.S. 294, 304 (1967): "The premise that property interests control the right of the Government to search and seize has been discredited." *Cf. Katz v. United States*, 389 U.S. 347, 353 (1967); *Silverman v. United States*, 365 U.S. 505 (1961); *Wong Sun v. United States*, 371 U.S. 471 (1963).

conduct ha consistently been upheld where the conversation was freely entered into by the defendant.

Thus, in *Lopez v. United States*, 373 U.S. 427, 439 (1963), the Supreme Court held that the recording made by a Government agent of a bribe offer was properly admitted into evidence. Since the agent was entitled to, and did, testify about the conversation he had with the defendant, there was no "seizure" of anything without the defendant's knowledge and consent when he voluntarily participated in the incriminating conversation. The recording device, therefore, was used only to obtain the most reliable evidence possible of a conversation which the Government rightfully heard through its agent. Moreover, the case involved "no eavesdropping whatever in any proper sense of that term. The Government did not use an electronic device to listen in on conversations it could not otherwise have heard." 373 U.S. at 439. It followed that there was no search and seizure which violated the Fourth Amendment.

Even more recently decided were *Lewis v. United States*, 385 U.S. 206 (1966), and *Hoffa v. United States*, 385 U.S. 293 (1966). In *Lewis*, the Court held that where the defendant invited a person, who was a secret Government agent, into his house for the purpose of selling narcotics to the agent, the subsequent admission into evidence of the narcotics bought by the agent and the conversations which had taken place between the parties did not violate the Fourth Amendment since the agent took nothing which the defendant had not voluntarily given to him, and the deception did not nullify the defendant's consent.

In *Hoffa*, the Court held that no violation of the Fourth Amendment occurred when an acquaintance of defendant, whom defendant had invited to his hotel suite, heard conversations directed to him or to others in his presence. Unknown to defendant the acquaintance was a paid Government informer. Holding that this was merely a case of "misplaced confidence" rather than unreasonable search and seizure, the Court noted that "[n]either this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." (Citing Lopez). 385 U.S. at 302.

Taken together, these cases establish the principle that one who voluntarily enters into a conversation with another takes the risk that such person may memorize, record, or (including *On Lee*) transmit the conversation.[2] It seems reasonable to conclude that if the recording in *Lopez* was not "eavesdropping," because it was done with the consent of one of the participants, and therefore not an unreasonable search and seizure, then a transmission is likewise not prohibited by the Fourth Amendment. Absent statutory prohibition, there is no legal significance in the fact that in one case, the transmission, a person is simultaneously overhearing the conversation with the consent of one of the participants while in the other a machine is employed to record such conversation for future disclosure. Therefore, I perceive no

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[2]It is important to note that, as in the instant case, there was no search warrant or court order in *Lopez*, *Lewis*, or *Hoffa*.

distinction which would require different treatment for purposes of the Fourth Amendment.

I do not read the recent decision in *Katz* v. *United States*, 389 U.S. 347 (1967) as changing the law as expressed in the cases just discussed. Nor do I view the decision in *Katz* as extending to the degree ascribed to it by the majority. In *Katz*, the Court reversed a conviction based upon one side of a telephone conversation overheard by Government agents by means of an electronic eavesdropping device installed on the public telephone booth in which defendant placed his call. The Court held that:

> ". . . the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection. See *Lewis* v. *United States*, 385 U.S. 206, 210; *United States* v. *Lee*, 274 U.S. 559, 563. But what he seeks to preserve as private, even in an area accessable to the public, may be constitutionally protected. . . ." 389 U.S. at 351-352.

The use of this language by the Supreme Court illustrates the distinction between *Katz* and the instant case, and demonstrates the presenent state of the law. In *Katz*, the Government surreptitiously overheard one side of a conversation without the consent of either party thereto, and after the defendant had taken reasonable steps to protect his privacy. The Court, therefore, held that "[t]he Government's activities in

electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." 389 U.S. at 353.

Unlike *Katz*, the instant case involves not a search and seizure, but a misplaced confidence--not surreptitious eavesdropping, but merely the obtaining of evidence of a conversation in which the Government, through its informer, was a participant. See *Lopez* v. *United States*, 373 U.S. 427, 439 (1963). Had the person on the other end of the telephone line in *Katz* allowed a Government agent to listen in on the conversation, there would have been no constitutional violation. *Rathbun* v. *United States*, 355 U.S. 107, 111 (1957); *United States* v. *Williams*, 311 F.2d 721, 725 (7th Cir. 1963), cert. den. 374 U.S. 812 (1963). Thus, once the conversation is deprived of its private character through the consent of one of the parties thereto, the Fourth Amendment, not having prohibited the initial exposure, does not prohibit the introduction into evidence of the conversation as transmitted or recorded. As stated in *Katz*, itself, "what a person knowingly exposes to the public, *even in his own home or office*, is not subject to Fourth Anendment protection. See *Lewis* v. *United States*, 385 U.S. 206, 210. . . ." 389 U.S. at 351 (emphasis added).

Thus, any expectation, by defendant, of privacy, when the person to whom the defendant is speaking consents to exposure of the conversation is not reasonable and therefore not protected by the

Fourth Amendment. This Court recently pointed out the distinction between electronic eavesdropping and misplaced confidence in *United States* v. *Haden*, 397 F.2d 460 (7th Cir. 1968), where we held (at page 465):

> "One who intends a conversation or transaction to be private and takes reasonable steps to keep it private is protected from Government intrusion unauthorized by warrant or well-defined special circumstances. Cf. *Katz* v. *United States*, 389 U.S. 347 (1967). But he is not protected from the consequences of error, if he places trust in the silence, duplicity or complicity of a Government agent or informer."

Therefore, the application of *Katz* to the instant case is its recognition of the principle that:

> "When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. *Hoffa v. United States, supra.* It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatum repetitions, is instead recording it or transmitting it to another. The present case [*Katz*] deals with an entirely different situation, for as the Court

emphasizes, the petitioner "sought to exclude . . . the uninvited ear," and spoke under circumstances in which a reasonable person would assume that uninvited ears were not listening." *Katz v. United States*, 389 U.S. 347, 363 n. (1967) (Concurring opinion of Justice White), (Emphasis supplied).[3]

In concluding that the Fourth Amendment does not prohibit the transmission of a conversation to a Government agent by a participant therein, where the defendant is a voluntary party to the conversation, I am mindful of the fact that, as recognized in numerous Supreme Court decisions,[4] as well as our own,[5] the strategem of deception is often the only way the Government can obtain information relating to a crime. To prohibit the use of such deceit might, in certain areas, prevent effective law enforcement. The Supreme Court in *Lewis v. United States*,

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[3]Justice White, in the same footnote, also cited *Hoffa*, *Lopez* and *On Lee* as cases "which are undisturbed by today's decision."

[4]*e.g.*, *Lewis v. United States*, 385 U.S. 206, 208-211 (1966); *Sorrells* v. *United States*, 287 U.S. 435, 441-442 (1932); *Andrews* v. *United States*, 162 U.S. 420, 423 (1896).

[5]*e.g.*, *United States v. Haden*, 397 F.2d 460 (7th Cir. 1968); *United States v. Lauchli*, 371 F.2d 303 (7th Cir. 1966); See also *Cellino v. United States*, 276 F.2d 941 (9th Cir. 1960).

385 U.S. 206, at 210-211 (1966), cited with approval a quotation from the Model Penal Code §2.10, comment, p. 16 (Tent. Draft No. 9, 1959):

> "Particularly, in the enforcement of vice, liquor or narcotics laws, it is all but impossible to obtain evidence for prosecution save by the use of decoys. There are rarely complaining witnesses. The participants in the crime enjoy themselves. Misrepresentations by a police officer or agent concerning the identity of the purchaser of illegal narcotics is a practical necessity . . . Therefore, the law must attempt to distinguish between those deceits and persuasions which are permissible and those which are not."

For the reasons stated above, I am of the view that the method of deception employed in the instant case is constitutionally permissible and is not so fundamentally unfair as to require reversal in the exercise of our supervisory power over the district court. Rather than being of an indiscriminate nature, as in *Berger* v. *New York*, 388 U.S. 41 (1967), *Katz* v. *United States*, 389 U.S. 347 (1967), and *Silverman* v. *United States*, 365 U.S. 505 (1961), the electronic transmission in the instant case included only those words which defendant voluntarily spoke to the informer and intended that he hear, thus knowingly taking the rsik that the informer would disclose them to the Government.

Such view does not, therefore, approve or permit violation of the

"requirements of the Fourth Amendment in the name of law enforcement," as *Berger* forbids (388 U.S. at 62), but rests on a conclusion compelled by an analysis of those decisions in which the Supreme Court has to date considered the subject matter.

HASTINGS, *Circuit Judge*, dissenting:

I join Chief Judge Castle in his dissent in this case. I wish to add a few brief comments of my own.

I was moved to vote for a rehearing in the instant *White* case because I thought the majority opinion, written by the late Judge Schnackenberg, apparently relied upon *Katz* v. *United States*, 389 U.S. 347 (1967), as its authority for a reversal of the judgment of conviction. I thought at that time, and now, that the factual situation there is so unlike the present case as to furnish no controlling precedent.

The original panel opinion was handed down in slip opinion form on March 18, 1971. Judge Major and Schnackenberg were in the majority, with Chief Judge Castle dissenting. It is conceded in the present *in banc* majority opinion that the authors of the prior panel majority decision were of the view that the rationale of *Katz* required a reversal of White's conviction. Yet that is precisely the opposite position taken by Judge Swygert in the instant majority opinion. Why was it necessary to indulge in this exercise in semantics to reach the same

result on the same cited authority?

I concede that Judge Swygert's majority opinion is a sophisticated constitutional essay in contrast to the short direct approach taken by Judge Schnackenberg. But therein may lie a present danger. With deference, I suggest that the present majority has undertaken a broad construction of *Katz* that was not taken by the Supreme Court. For a stimulating treatment of the subject I recommend the reading of *Katz* v. *United States*: The Limits of The Fourth Amendment, by Edmund W. Kitch, Associate Professor of Law, The University of Chicago.[1]

My final comment is directed to the rather summary reversal of *On Lee v. United States* 343 U.S. 747 (1952), by the majority here. Chief Judge Castle has ably covered this in his dissent. My fundamental objection to the majority mistreatment of *On Lee* is that it has no authority to do what it did. I have long held the rather old fashioned view that only the Supreme Court could set aside its holdings. By the process of taking a head count and making a guess on what the Court may do at some future time, the majority holds: "On its facts, *On Lee* is directly in point and would control the disposition of this case if *Katz* had not supervened and if the Supreme Court had not on other occasions completely eroded the decisional basis of *On Lee*."

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[1]Released a few days ago by The University of Chicago Press, as a chapter in The Supreme Court Review, 1968, pp. 133-152, edited by Professor Philip B. Kurland.

I make no prophecy on the future of *On Lee*. Until it is set aside by the Supreme Court, I regard it as controlling and dispositive of the present appeal. I would affirm the judgment of conviction.

APPENDIX E

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
SEPTEMBER TERM 1967

GEORGE HENRY DOTY, Appellant, vs UNITED STATES OF AMERICA, Appellee,	No. 9031
CLEO EPPS, Appellant, vs UNITED STATES OF AMERICA, Appellee,	No. 9032
RAYMOND O. JONES, Appellant, vs UNITED STATES OF AMERICA, Appellee	No. 9033
JERRY LEE HOLIDAY, Appellant, vs UNITED STATES OF AMERICA, Appellee	No. 9035

BILLY RAY ADAMS, Appellant, vs UNITED STATES OF AMERICA, Appellee,	No. 9036
HAROLD BEN MARLEY, Appellant, vs UNITED STATES OF AMERICA, Appellee,	No. 9037
ALBERT HILL, JR., Appellant, vs UNITED STATES OF AMERICA, Appellee,	No. 9038
SAM GILBERT, Appellant, vs UNITED STATES OF AMERICA, Appellee.	No. 9034

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Thomas A. Wallace (Everett S. Collins an Thomas A. Wallace on the briefs) for Appellants Doty (9031), Epps (9032), Jones (9033), and Gilbert (9034).

John A. Claro, for Appellants Holiday (9035), Adams (9036), Marley (9037), and Hill (9038).

James E. Ritchie, Assistant U. S. Attorney (Lawrence A. McSoud, United States Attorney; James E. Ritchie, Assistant U. S. Attorney; Robert P. Santee, Assistant U. S. Attorney, on the brief) for Appellee.

Before MURRAH, Chief Judge, JONES* and HILL, Circuit Judges.

JONES, Circuit Judge.

This is an illicit still and nontax-paid whiskey case on appeal from the United States District Court for the Northern District of Oklahoma. In that court the appellants George Doty, Cleo Epps, Raymond O. Jones, Jerry Lee Holiday, Billy Ray Adams, Harold Ben Marley, Albert Hill and Sam Gilbert, were tried together on an indictment containing fourteen substantive counts charging violations of 26 U.S.C.A. Secs. 5179(A), 5173(A), 5205(A)(2), 5601(A)(1), 5601(A)(2), 5601(A)(4), 5601(A)(7) and 5604(A)(1). A fifteenth count based on 18 U.S.C.A. Sec. 371 charged the defendants with conspiring among themselves and with other unnamed persons to violate

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* Of the Fifth Circuit, sitting by designation.

the above and other sections of the Internal Revenue Code.[1]

With the exception of Sam Gilbert, who was charged only with conspiracy, verdicts of guilty were returned against each of the appellants on the several substantive charges against them. All of the defendants, except Albert Hill, were convicted of the conspiracy charge. Specifying numerous errors as a basis for reversal, the defendants have appealed from the judgments entered on the jury's verdicts. Because of our disposition of the case, however, several of the questions raised need not be discussed or decided.[2]

The principal and most persuasive of the appellants' arguments urges the impropriety of Government counsel's closing remarks to the jury. The record discloses that, of the eight defendants, only Cleo Epps and Sam Gilbert testified in their own behalf.[3]

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[1]26 U.S.C.A. Secs. 5171(A), 5601(A)(8), and 5601(A)(12).

[2]Appellants Holiday and Adams assert that incriminating statements were elicited from them in violation of the Fifth Amendment; appellants Hill and Epps assert that a fatal variance exists between the indictment and the evidence adduced at the trial, and several of the appellants assert the lack of substantial evidence to show the existence of a conspiracy.

[3]Appellants Holiday and Marley also took the stand. But their testimony was elicited only in support of collateral motions.

The other defendants remained silent. Appellants contend here that the United States Attorney focused the jury's attention on this fact.

Government counsel's final argument was divided into two fifteen minute portions permitting time for the defense attorneys' closing remarks to intervene. At the beginning of Government counsel's jury address, at a time when the jury is likely to be most attentive, the following observation was made:

> "I think the most important thing that has been demonstrated by the evidence in this case is that the evidence is uncontradicted as against every defendant except the defendant Epps and the defendant Gilbert. There is no evidence to deny George Doty, Raymond O. Jones, Thomas Graham. There has been no evidence to contradict that whatsoever. Upon your oaths as jurors, you have no other obligation except to come in with a verdict of guilty as to those defendants because that evidence goes to you now and is to be considered and it has not been contradicted by the defendants whatsoever. It is undisputed. There has been no explanation of it. It is uncontradicted evidence, therefore it stands for the truth."

And again in the second fifteen minute portion of his argument to the jury, the United States Attorney asserted:

> ". . . And as I warned you when I made my opening statement in this

case, they are going to hit these minor things, but have they gotten up here and discussed the evidence in this case. They have not. Again, still even in the arguments, they have done nothing to show, to contradict the evidence against all of these defendants except two people. And who are these people? The person who is running the operation and her brother who is the purchasing agent."

It is the general rule that Government counsel may direct the jury's attention to the fact that the evidence against the defendant is uncontradicted, especially when the facts in issue could be controverted by persons other than the defendant.[4] Ruiz v. United States, 10th Cir. 1966, 365 F.2d 103. If this rule were controlling here, then the Government's contention that its attorney's remarks constitute fair comment might have some validity.[5] Because it is

[4]The extent to which this rule conflicts, if at all, with Desmond v. United States, 1st Cir. 1965, 345 F.2d 225, which held that a prosecutor could not properly say to the jury that the evidence was uncontradicted when only the defendant was able to controvert the damaging testimony, need not be discussed. We note only that this Circuit has not been confronted with a case where the fact of uncontradicted evidence has been pointed out to the jury when a defendant was theonly person who could offer a contradiction.

[5]But see Desmond v. United States, supra note 4.

our view, however, that the attorney's remarks go beyond a permissive comment that the evidence is uncontradicted is shown by the more general rule as thus stated:

> "It is concededly improper and reversible error to comment on the failure of a defendant to testify in his own behalf, and the test is whether the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." Knowles v. United States, 10th Cir. 1955, 224 F.2d 168.

The prosecutor conceded that the Government's evidence was contradicted as to two defendants whom he named. These defendants had taken the stand. The prosecutor asserted and reasserted that the evidence was uncontradicted as to the others. The innuendo is plain. It is clear that the prosecutor intended that the jury should infer that the evidence was uncontradicted by those defendants who did not take the stand. When the prosecutor named the two who had testified and conceded that the evidence as to them was contradicted, can it be doubted that he commented upon the failure of the others to testify when he emphatically demanded the conviction of those who had not testified on the ground that: "The evidence is uncontradicted." The prosecutor's statement that the evidence "has not been contradicted by the defendants" was little, if any, different in meaning, in the context of his argument, from a statement that the defendants had not testified. We

conclude that the prosecutor's comments were improper and prejudicial as to all of the appellants, except Gilbert and Epps, and that the convictions of these six appellants must be reversed on this ground.

The Government urges that, even if the prosecutor's comments were prejudicial, appellants have waived the error by failure to timely object. It is established that:

> "Counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial." United States v. Soconoy-Vacuum Oil Co., 310 U.S. 150, 238-239, 60 S.Ct. 811, 84 L.Ed. 1129.

In this connection, however, consideration must be given to Rule 52(b), Fed. R. Crim. Proc., 18 U.S.C.A., which provides:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

We believe this rule to be controlling here.

It seems sufficient to say that the prosecutor's comments to the jury operated to diminish the scope of a clearly delineated constitutional guarantee.

> "For comment on the refusal to testify is a remnant of the

'inquisitorial system of criminal justice,' Murphy v. Waterfront Comm'n., 378 U.S. 52, 55, 84 S.Ct. 1594, 12 L.Ed.2d 678, which the Fifth Amendment outlaws.' It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Griffin v. California, 380 U.S. 609, 614, 85 S.Ct. 1797, 14 L.Ed.2d 730.

We would be remiss in holding, particularly where prejudice is so clearly apparent, that an error of constitutional dimensions does not affect substantial rights. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705; Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557. The error is plain; and, notwithstanding the failure to object, the comments cannot be condoned.[6]

Appellant Gilbert, who testified in his own behalf at the trial, challenges the sufficiency of the evidence to support the jury's verdict finding him guilty of conspiracy to violate several Internal Revenue laws of the United States. A conviction under 18 U.S.C.A. Sec. 371

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[6]Other cases finding a prosecutor's closing argument to constiute plain error are United States v. Graham, 6th Cir. 1963, 325 F.2d 922; Wagner v. United States, 5th Cir. 1959, 263 F.2d 877; Ginsberg v. United States, 5th Cir. 1958, 257 F.2d 950; Stewart v. United States, D.C. Cir. 1957, 247 F.2d 42; Read v. United States, 8th Cir. 1930, 42 F.2d 636.

requires "Proof of an agreement to commit an offense against the United States." Pereira v. United States, 347 U.S. 1, 12, 74 S.Ct. 358, 98 L. Ed. 435. In Jones v. United States, 10th Cir. 1958, 251 F.2d 288, 290, it is stated by this Court:

> "'In determining [the question of] the sufficiency of the evidence to support a verdict, the inferences to be drawn therefrom are viewed in the light most favorable to the prosecution.'" O'Neal v. United States (10th Cir. 1957, 240 F.2d 700, 701); Seefeldt v. United States, 10 Cir., 183 F.2d 713; Wilder v. United States, 10 Cir., 100 F.2d 177. The agreement need not be in any particular form. By its nature it is seldom susceptible of direct proof. Ordinarily conspiracies can be established only by the acts and conduct of the conspirators and the inferences to be drawn therefrom. Butler v. United States, 10 Cir., 197 F.2d 561. Generally convictions will be sustained if the circumstances, acts and conduct of the parties are of such character that the minds of reasonable men may conclude therefrom that an unlawful agreement exists."

Necessarily, knowledge of the conspiracy is "an essential ingredient of the proof" required to support a verdict. Ingram v. United States, 360 U.S. 672, 678, 79 S.Ct. 1314, 3 L.Ed. 2d 1503.

The evidence, as it relates to Sam Gilbert's involvement in a conspiracy, may be thus summarized. On March 30, 1965, Gilbert purchased 10,000 pounds of sugar from Gordon

Hixson with funds obtained from his sister, appellant Epps. Hixson arranged the sale through a warehouse in Fort Smith, Arkansas. On April 8, 1965, an additional 12,000 pounds of sugar was purchased through the same grocer and warehouse, but Gilbert denies any involvement in this transaction. To prove Gilbert's involvement in the second transaction, Alcohol and Tobacco Tax investigators testified that on April 8, 1965, they follwed a red Ford truck travelling along Highway 64 away from Fort Smith, Arkansas, toward Warner, Oklahoma. Following two or three car-lengths behind the truck, the investigators, so they claimed, were able to ascertain that the truck contained many sacks of White Gold sugar. One of the investigators, Robert M. Finley, stated that, when the truck entered a weigh station near Warner, a 1964 maroon Chevrolet containing two occupants pulled off alongside the road just past the station. Finley testified that, after a few minutes, the maroon Chevrolet continued on into Warner, pulled into a drive-in parking area, remained there for a short while, proceeded back toward the weigh station, and then ten or fifteen minutes later returned to the drive-in parking area. In addition to corroborating this account, John L. Day, the other investigator, testified that Sam Gilbert was the driver of the truck and identified Cleo Epps and Raymond O. Jones as the occupants of the maroon Chevrolet.

Our attention is directed to no other testimony showing appellant Gilbert's connection with or knowledge of the alleged conspiracy. Viewing the evidence in a light most favorable to the prosecution, it may be taken as established that Gilbert

made large sugar purchases on March 30 and April 8, and that, on this latter occasion, he was convoyed into Oklahoma by his sister and Raymond O. Jones. The jury might conjecture that Gilbert was hauling sugar to a still but the fact that he was being followed for some undisclosed purpose by Epps and Jones does not trace the sugar to any still identified with any of the other alleged conspirators or into any illicit spirits which any of the other alleged conspirators may have made or sold. The most speculative conjecture could not place the sugar hauled by Gilbert at the still of any of the other alleged conspirators at any pertinent time since the raid was a half year later. No testimony even intimates that Gilbert was personally involved in any of the whiskey sales. While Gilbert's sugar purchases and association with Epps and Jones may be sufficient to create a suspicion, we say here as this Court has said before:

> "Evidence which creates a mere suspicion of guilt is not enough. Guilt may not be inferred from mere association." Glover v. United States, 10th Cir. 1962, 306 F.2d 594.

The evidence against Gilbert is not sufficient to support a conviction.

Appellant Cleo Epps, who also testified at the trial, was convicted on two counts of aiding and abetting others in the sale of untaxed spirits and of conspiracy to violate specified Internal Revenue laws relating to liquor. At trial the Government was permitted, over appellant's objection, to introduce into evidence several tape recordings of telephone conversations carried on

between Epps and Charles Reese Walter, an undercover Alcohol and Tobacco Tax investigator. These recordings, which were made with the consent and under the direction of Agent Walter, constituted a substantial part of the Government's case against Epps. Epps contends here that the admission of these recordings into evidence invaded her rights under the Fourth Amendment.

Katz v. United States, 389 U.S. 347, 88 S.Ct. ____, 19 L.Ed. 2d 576, is the most recent of the Supreme Court decisions dealing with the admissibility of electronically obtained eavesdrop evidence. In that case, it was held that the use of an electronic listening and recording device attached to the outside of a public telephone booth to obtain evidence against a suspect constituted a "search and seizure" within the meaning of the Fourth Amendment. Because the search was conducted without prior judicial sanction as required by the Fourth Amendment, Katz' conviction was reversed.

We think the principles of Katz are applicable here. There is, to be sure, a factual difference between this case and Katz. We are unable to see any distinguishing difference between the placing of the eavesdropping device at one rather than at the other end of the telephone line over which the recorded conversation was communicated. The fact that the appellant's recorded conversation was with an undercover agent of the Government does not render it admissible. United States v. White, 7th Cir. 1968, ___ F.2d ____, March 18, 1968, Nos. 16021, 16022. But see Dancy v. U. S. 5th Cir. 1968, ____F.2d ____, Feb. 1, 1968,

No. 24611. Because no prior approval by judge or magistrate was sought or obtained, the search was unreasonable, and appellant Epps is entitled to a new trial without this evidence being used against her.

It seems appropriate to observe that while the conviction of the appellant, Harold Ben Marley, is being reversed because of improper comment of the prosecuting attorney, a reversal would probably be required because of inadequate evidence to sustain a conviction. It is shown that Marley made several purchases of plastic jugs using the same alias as had been used by the appellant Jones in making similar purchases. More than four months after the last of his jug purchases, Marley was seen dirving a pick-up truck along a country road about a mile distant from the location of the still which was involved in this cause and which was then under surveillance by the agents of the revenue. This evidence, like that against Gilbert, may create a strong suspicion that Marley was implicated in a conspiracy with some or all of the other appellants, but it is not enough to make a case for the jury.

For the reasons herein set forth, the judgment of the district court as to all of the appellants is reversed and the cause remanded for such proceedings, not inconsistent with the opinion, as may be appropriate.

REVERSED AND REMANDED.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1041

SAMUEL A. KAUFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1969. The petition for a writ of certiorari was filed on February 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether under the rationale of *Katz* v. *United States,* 389 U.S. 347, the court should have excluded

336-442—69

evidence of federal agents as to the contents of conversations with petitioner overheard by them (a) by means of an electronic transmitting device placed on the person of an agent whom petitioner was trying to bribe and (b) on an extension telephone with the consent of the agent who spoke to petitioner.

STATEMENT

1. After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of bribing an agent of the Internal Revenue Service with intent to influence official action, in violation of 18 U.S.C. 201(b). He was sentenced to imprisonment for one year and a $4000 fine.

The facts are not in dispute. In early 1966 petitioner, a certified public accountant, had a series of meetings with Internal Revenue Agent Arney to discuss an audit of two of his clients' federal income tax returns. At a meeting on July 21, 1966, after being informed that an additional tax of $7000 to $8000 was due, petitioner offered Arney $400 to reduce the tax deficiency to around $500. Arney immediately reported the bribe offer to his superiors. The next day, with I.R.S. Agent Goldenberg listening in on an extension telephone with Arney's consent, Arney called petitioner and told him that he had decided to go along with the offer. They agreed to meet on July 25 at a subway station to complete the transaction. On July 25, Arney went to the appointed place equipped with a Fargo radio transmitter secreted on his person and a Minifon recording device in an attache case. He told petitioner that he had

reduced the tax deficiency from $7000 to $497. Petitioner counted out $400 and passed it to Arney.[1]

2. The court of appeals affirmed the conviction on December 18, 1967 (see 387 F. 2d 17), the day this Court decided *Katz* v. *United States,* 389 U.S. 347. Thereafter petitioner brought the present *coram nobis* action contending that under *Katz* evidence of the overhearing on the extension telephone and the tape recording had been improperly received. The trial judge denied relief (Pet. App. B), and the court of appeals affirmed (Pet. App. A).

DISCUSSION

The issue of whether a search warrant is required for the overhearing or recording of a conversation by electronic means, where one of the parties has consented, is before this Court on our petition for a writ of certiorari to the Seventh Circuit in *United States* v. *White,* No. 1024, this Term. In the *White* case, the Seventh Circuit *en banc,* with three judges dissenting, held that a warrant was required even where the overhearing was with the consent of one party to the conversation. The court of appeals below specifically stated that it was not persuaded by the majority opinion in *White* and would follow this Court's decision in *Lopez* v. *United States,* 373 U.S. 427, which sustained the admissibility of a tape recording obtained by electronic means in circumstances indistinguishable from the instant case (Pet. App. A. 4).

[1] Both Agent Arney and Agent Goldenberg testified at the trial. In addition a recording of the July 25 conversation was introduced in evidence.

For the reasons set forth in our petition for certiorari in *White,* we believe the holding of the court of appeals in this case to be correct. In view, however, of the conflict between the circuits on this significant question, we do not oppose the granting of certiorari to consider whether petitioner's Fourth Amendment rights were violated by the overhearing and recording of his conversations.[2] We note, however, that the question whether *Katz* should be applied retrospectively is pending in *Desist et al* v. *United States,* (No. 12, this Term). Since the federal agents' conduct in this case occurred prior to the holding in *Katz,* there would seem to be no reason to grant the present petition if it is decided that *Katz* should not be given retroactive application.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

March 1969.

[2] As pointed out in the petition in *White*, the Fifth Circuit in several opinions has held, contrary to *White*, that the *Katz* requirement of a warrant was not meant to apply to consent situations. A decision of the Tenth Circuit in *Holt* v. *United States* (404 F. 2d 914) is in accord with that view. A contrary decision by a different panel of the Tenth Circuit in *Doty* v. *United States* (Pet. App. E), is presently pending on a petition for rehearing granted by the panel.

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IN THE

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OCTOBER TERM, 1968

No. 1041

SAMUEL A. KAUFER,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF AFFIRMANCE OF ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FREDERICK H. BLOCK,
295 Madison Avenue,
New York, N. Y.

HERBERT MONTE LEVY,
61 Broadway,
New York, N. Y.
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1041.

SAMUEL A. KAUFER,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF AFFIRMANCE OF ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Samuel A. Kaufer, hereby petitions for rehearing of this Court's affirmance on April 1, 1969 of the order of the United States Court of Appeals for the Second Circuit, which had affirmed the denial of post-conviction relief sought on the basis of warrantless electronic eavesdropping.

In affirming, this Court cited only its March 24, 1969 decision in *Desist* v. *United States,* 394 U. S. ——, which had held that *Katz* v. *United States,* 389 U. S. 347, was "to be applied only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967 [the date of the *Katz* decision]." Six days after granting certiorari and summarily affirming in the case at bar—where the electronic surveillance was conducted prior to December 18, 1967—this Court on April 7, 1969 granted review in *United*

States v. *White*, 394 U. S. ——, where the electronic eavesdropping also occurred prior to December 18, 1967.

The only apparent explanation for the fact that this Court did not see fit to reverse summarily in *White*, as suggested by the Government therein (Petition, p. 6), seems to be that neither *Katz* nor *Desist* disposed of the question of the constitutionality of warrantless electronic eavesdropping where one party to the conversation had consented thereto. If this was the basis for this Court's action in *White*, then, since the Government has already conceded herein that the issues in *White* and the case at bar are identical (Memorandum for the United States, pp. 3-4),[1] petitioner should be afforded the same full hearing by this Court as have the parties in *White*. There would be no problem of retroactivity in *White* should the defendant there establish for the first time that such eavesdropping is unconstitutional (*Desist* v. *United States, supra*, n. 24); there would likewise be no problem of retroactivity for petitioner, identically situated.

CONCLUSION

Petition for rehearing of the judgment of affirmance should be granted, and this cause set down for argument with the argument in *White*.

Respectfully submitted,

FREDERICK H. BLOCK
and
HERBERT MONTE LEVY,
Attorneys for Petitioner.

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[1] While the informer in *White* did not testify, the fruits of electronic eavesdropping corroborated the testimony of an agent who heard and observed significant conversations and actions. Here, too, the fruits of electronic eavesdropping corroborated the agent's testimony.

Certificate of Counsel.

HERBERT MONTE LEVY, one of counsel for petitioner Samuel A. Kaufer, hereby certifies, pursuant to Rule 58(1) of the Rules of this Court, that the above petition for rehearing is presented in good faith and not for delay.

HERBERT MONTE LEVY.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

KAUFER *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 1041. Decided April 1, 1969.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is affirmed. *Desist* v. *United States*, 394 U. S. —, decided March 24, 1969.

MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS dissent from the affirmance of the judgment.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE would deny the petition for a writ of certiorari.